**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | ) | CC Docket No. 01-338 |
| | ) | |
| Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| | ) | |
| Deployment of Wireline Services Offering Advanced Telecommunications Capability | ) | CC Docket No. 98-147 |

# OPPOSITION OF AT&T CORP. TO BELLSOUTH PETITION FOR RECONSIDERATION

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD, LLP
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7237

David L. Lawson
C. Frederick Beckner III
Michael J. Hunseder
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Leonard J. Cali
Lawrence J. Lafaro
Stephen C. Garavito
AT&T CORP.
One AT&T Way
Bedminster, NJ 07921
(908) 532-1850

November 6, 2003

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**OPPOSITION OF AT&T CORP.**
**TO BELLSOUTH PETITION FOR RECONSIDERATION**

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") respectfully submits this opposition to BellSouth's Petition for Clarification and/or Partial Reconsideration ("Petition") of the Commission's *Triennial Review Order* ("*TRO*").

## INTRODUCTION AND SUMMARY

The Petition is a wolf in sheep's clothing. BellSouth claims to seek mere "clarifications" and minor revisions to eliminate unintended "obstacles to the deployment of broadband services and technologies to mass market consumers." Petition at ii. In truth, the sole, transparent purpose of the Petition is to *erect* obstacles to competition in the provision of traditional local services to both mass market and enterprise customers. The "broadband" relief that BellSouth seeks would do nothing to accelerate the Bells' provision of next-generation services to mass market consumers or, as BellSouth's chairman recently admitted, even to speed fiber deployment. Rather, BellSouth seeks to use its proposed wholesale revision of the *TRO* rules to enable the Bells to wall off from competition *millions* of customers, including mass market consumers that are served by *existing* copper-fed loops, which the Bells would not enhance in

any way and over which the Bells provide only traditional services. The Commission must not be fooled. BellSouth's proposals are intended to, and would, do great harm to consumers and competition, and would discourage, not encourage, investment in and deployment of advanced services.

No aspect of the Petition is as BellSouth represents it. BellSouth seeks "clarification" of Commission rulings that are entirely clear and foreclose BellSouth's positions. BellSouth seeks "reconsideration" solely on the basis of extra-record materials that could have been, but were not, "previously submitted to the Commission," and are therefore patently improper bases for reconsideration. *See* 47 C.F.R. § 1.429(b). In what is a remarkably barren pleading given the scope of the requested relief, BellSouth avoids any mention at all of the practical implications of its proposals. In proposing that the Commission redefine "fiber-to-the-home" ("FTTH") to include "fiber-not-to-the-home," for example, BellSouth fails to note that its proposal would with the stroke of a pen – and without *any* additional investment or new services deployment – sweep in more than a million of BellSouth's *existing* "hybrid" fiber-copper loops over which BellSouth provides only traditional services. And, contrary to BellSouth's claim that its Petition is aimed at mass market consumers, several of the proposals are back door attempts to undo the Commission's core DS1 and DS3 *enterprise* loop unbundling rules.

In particular, the Petition is an extraordinarily deceptive attempt to blur the distinctions the Commission has drawn between true "greenfield" deployments, with respect to which the Commission has accepted competitive parity arguments in the "largely theoretical" mass market FTTH context, and a wide range of non-FTTH "brownfield" deployments where no such arguments are possible. BellSouth seeks to exploit the Commission's limited finding that in a true FTTH greenfield deployment where new fiber must be placed from the central office to customers' premises "entry barriers appear to be largely the same for both incumbent and

competitive LECs," *TRO* ¶ 275, and apply it to situations where that plainly is not true. The Petition never even confronts these greenfield/brownfield – or mass market/enterprise – distinctions, but virtually all of its proposals are designed to obliterate these distinctions and extend the most extreme broadband limitations that the Commission found appropriate only in the nascent, largely theoretical construct of mass market FTTH to millions of ordinary mass market and enterprise loops.

BellSouth first proposes to transform the narrow FTTH unbundling exception that the Commission created for a new broadband-focused technology that "is still in its infancy," *TRO* ¶ 274, and that the Bells have deployed "to some 400 homes," *id*. n.809, into a rule-swallowing loophole that would immediately cover *millions* of the Bells' existing loops. The Petition would extend deregulatory rules intended to foster investment in truly *new* facilities and technologies to existing wires, thereby discouraging investment, undercutting competition, and harming consumers.

The Commission should take no part in this latest chicanery. BellSouth's own conduct refutes its claim that extending the rules applicable to FTTH to hybrid loops that have "only" 500 feet of copper would cause BellSouth actually to provide next-generation services. BellSouth already has over a million of these "fiber-to-the-curb" or "FTTC" loops that it claims are theoretically capable of providing the same next-generation services as FTTH loops. Yet BellSouth does *not* offer video or next-generation services over those loops (or even deploy the electronics necessary to support those services), notwithstanding that the existing rules already entitle BellSouth to keep all retail revenues associated with any next-generation services provided over hybrid loops. Given that the Commission's existing rules enable BellSouth to monopolize the next-generation capabilities of FTTC and other hybrid loops, BellSouth's only possible purpose in seeking to treat FTTC loops as FTTH loops is a profoundly anticompetitive

one: to evade obligations that apply to hybrid loops and to impede CLECs' right to use those FTTC loops (through UNE-P, UNE-L or even subloop unbundling) to provide traditional voice and data services.

BellSouth's proposal is, in all events, foreclosed as a matter of law for the simple reason that there is *no* cognizable evidence to support its bald assertions that FTTH and FTTC loops have identical impairment characteristics. In establishing the narrow rules applicable to FTTH, the Commission, as proof of non-impairment, relied on evidence that CLECs had deployed about 40,000 such loops to the Bells' 400. The opposite is true for FTTC loops – the Bells apparently have millions of such loops, and there is no evidence that CLECs have any. That merely reflects fundamental and obvious cost and impairment differences between true FTTH deployments and FTTC (and other hybrid) loops. In true FTTH deployments any carrier, whether ILEC and CLEC, must incur substantial structure, right of way and other costs to deploy new wires. *See* Abernathy Statement at 2 ("fiber-to-the-home (FTTH) investment . . . entails a complete replacement of legacy facilities (or entirely new construction in greenfield situations) and thus imposes immense costs and risks on incumbents as well as new entrants"). By contrast, ILECs, but *not* CLECs, already have existing wires, structures and rights-of-way to customers' premises that they can transform into "FTTC loops" simply by replacing some of the existing copper with fiber – and the Bells have already accomplished many such incremental transformations that CLECs could not conceivably duplicate.

Nor is there any evidence that the FTTC loops that BellSouth uses today to provide only traditional services could be providing the full range of next-generation services that true FTTH deployments would enable. In fact, as detailed below, the evidence BellSouth has submitted quite plainly shows that FTTC loops *cannot* support the "wide-array" of video and other "next-generation" applications upon which the Commission based its FTTH findings. *See TRO* ¶ 276.

In a proposal that sets a new "have your cake and eat it too" standard, BellSouth seeks equally radical and insupportable new restrictions on access to the hybrid loops that it would have the Commission leave in that category. According to BellSouth, the Commission impermissibly required BellSouth to provide access to an "unbuilt superior network" when it granted the Bells' requests that they be allowed to provide *inferior* "TDM" capabilities to CLECs that seek access to hybrid loops for the provision of broadband services. BellSouth does not even hint at how many millions of customers its new "no modifications" proposal would insulate from competition, but the proposal is ludicrous on its face. Having been granted its wish to deny CLECs access to the full packetized capabilities of mass market, hybrid loops *only* on the condition that it provide nondiscriminatory access to a traditional TDM transmission path, BellSouth cannot seriously complain about any modifications that it must make to limit CLECs to that inferior TDM access. *See TRO* ¶¶ 632-41; *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 813 n.33 (8th Cir. 1997) (ILEC must modify facilities "to the extent necessary to accommodate interconnection or access to network elements"). Even more troubling (and unlawful) are BellSouth's vague statements that it might refuse to provide access to next-generation capabilities of DS1 and other enterprise loops, despite the Commission's clear statement that CLEC obtain access to such loops regardless of the technology used to provide them.

BellSouth also seeks "clarification" that fiber-to-the-*home* unbundling relief could extend to *any* fiber loop serving the "premises" of enterprise customers in multi-unit buildings. But, as just noted, the Commission's rules are very clear that CLECs may obtain the full capabilities of essential DS1 and DS3 loops to serve enterprise customers, and those rules do not – and could not rationally – cease to apply merely because an enterprise customer is not located in a stand-alone building or in a building that houses only other enterprise customers. In a similar vein, BellSouth, again in the guise of "clarification," seeks to muddy the otherwise clear distinction

between unbundling of FTTH loops used to serve mass market customers and unbundling of dark fiber used to serve enterprise customers. BellSouth appears to believe that the Commission's recent *Errata* blurs this distinction and proposes that this "inconsistency" be addressed by exempting new dark fiber facilities from *any* unbundling requirements. But the only inconsistency is BellSouth's mistaken reading of the Commission's fiber-to-the-*home* rules to include all enterprise loops. Properly read, there is no inconsistency in the Commission's rules, and therefore no basis to limit unbundling obligations for "new" enterprise dark fiber and retain it for existing dark fiber.

Finally, BellSouth asks the Commission to abrogate the independent § 271 unbundling obligations. The Commission has already properly rejected BellSouth's claim that the § 271 unbundling requirements only apply to the extent that § 251 unbundling requirements continue to apply. BellSouth does not even attempt to explain how the Commission could read into the § 271 unbundling requirements narrowband/broadband distinctions that those provisions do not contain. And the terms of the Act, including bedrock nondiscrimination obligations, foreclose BellSouth's proposal that it be allowed to engage in the "anticompetitive practice" of breaking apart already combined network facilities, "not for any productive reason, but just to impose wasteful reconnection costs on new entrants." *Iowa Utils.* v. *FCC*, 525 U.S. 366, 395 (1999).

## I. THE COMMISSION SHOULD REJECT BELLSOUTH'S "FIBER-IN-THE-VICINITY" PROPOSAL.

### A. Radically Expanding The Narrow FTTH Exception Would Undermine Both Broadband Policies And Competition For Existing Voice Services.

BellSouth seeks the regulatory benefits currently dependent on constructing true FTTH – which holds tremendous promise for consumers, but has rarely been deployed – merely by continuing incrementally to extend fiber to the "curb," which has been widely deployed *without* associated next-generation service benefits for consumers.

Through its unbundling determinations linked to FTTH deployment, the Commission

attempted to construct a regulatory incentive for new deployments of the now rarely deployed FTTH technology that it determined is most likely to produce consumer benefits in the form of next-generation services. Its rules provide that, in true greenfield deployments of FTTH to the mass market, incumbent LECs would not be required to unbundle the loop. *TRO* ¶ 275. In brownfield situations where ILECs overbuild with entirely fiber loops to the mass market, ILECs need not provide access to the fiber, but must maintain copper or, if it is retired, provide a 64 kbps transmission path capable of providing voice grade services. *Id.* ¶¶ 276-77. But, where true FTTH is not deployed and the ILEC maintains any hybrid loop used to serve the mass market (whether newly constructed or an upgrade to existing facilities), the Commission required ILECs to provide TDM capabilities where CLECs seek to provide broadband and either a voice grade channel on the hybrid loop or a spare home-run copper loop. *Id.* ¶¶ 289, 296-97; *see also id* ¶ 253 (subloops).[1] Of course, entirely different rules apply to enterprise loops, irrespective of technology. *See id.* ¶¶ 298-342 & n.965. Through these rules, the Commission thought that incumbents would be encouraged to provide true FTTH and next-generation services to the mass market because deployment of those facilities would be subject to reduced unbundling requirements compared to hybrid loops or all-copper loops.

For myriad reasons set forth in detail in the record (*e.g.* AT&T's comments (at 65-87) and reply comments (at 73-125)), AT&T does not agree that reduced unbundling requirements will in fact lead to more fiber deployment. The incumbents have no intention to deploy true FTTH regardless of the Commission's rules and will make investments in hybrid loops because deploying fiber further in the network makes economic sense *independent* of the ability to offer

[1] Of course, to the extent that the ILECs send ADSL traffic over legacy (as opposed to next generation loops with DSLAM capabilities built at or near remote terminals) hybrid loops using TDM from the customer premises to the central office, the *TRO* obligates ILECs to provide unbundled access to the TDM-based broadband and narrowband capabilities of legacy hybrid loops for CLEC provision of voice and ADSL services.

broadband services.[2] Accordingly, providing even *more* relief from unbundling to the broader category of hybrid loops urged by BellSouth would do nothing to accelerate delivery of next-generation services and would simply mean that more customers would be unable to receive competitive alternatives provided by UNEs. Nevertheless, even if the Commission were correct, BellSouth's proposal to broaden the FTTH rules is clearly at odds with the Commission's policies and the rationales underlying the *TRO*: It would undermine the objective of "encouraging the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," § 706, and it would impede development of local competition.

By granting the unbundling relief the Commission deemed appropriate for true mass market FTTH loops even if incumbents have deployed only hybrid loops with 500 feet of copper, BellSouth asks the Commission simply to hand it the regulatory carrot. That would be extraordinarily bad policy – as BellSouth's own conduct cautions, no more broadband services would reach consumers tomorrow than reach them today despite existing FTTC facilities. At the same time, BellSouth would seek to use that regulatory relief – at minimal expense and without providing any next-generation services to consumers – to foreclose CLECs from accessing the full capabilities of millions of loops, or from accessing those loops altogether.

Congress has not directed the Commission merely to eliminate barriers to the *deployment* of fiber in local networks – which the incumbents are already undertaking for a host of operational and other reasons unrelated to the delivery of broadband services to consumers – but to encourage the actual *delivery* of next-generation services to all Americans.[3] The Commission

[2] *See*, *e.g.*, AT&T Comments, Willig Dec. ¶¶ 167-79 (noting, *inter alia*, cost savings on maintenance and from operating fiber at higher utilization levels).

[3] *See* § 706; *see also, e.g.,*, Second Report, *Inquiry Concerning The Deployment of Advanced Telecommunications Capability*, 15 FCC Rcd. 20913 (2000) ("deployment of infrastructure alone does not guarantee that the benefits of advanced telecommunications capability will flow to all consumers as Congress intended").

found that FTTH, which "is still in its infancy," (*TRO* ¶¶ 219, 274 (FTTH available in only 47 communities today)), will support the broadest range of next-generation services and will require substantial new investment that only makes sense if the carrier can sell the full range of existing and next-generation services that FTTH can support.[4]

BellSouth's own conduct confirms that deployment of hybrid loops, even those that meet BellSouth's FTTC definition, is *not* sufficient to create the conditions that will lead the Bells actually to deliver next-generation services. Although BellSouth nowhere in its Petition provides information on the number of existing loops that would be drawn into its dramatically expanded FTTH definition, it has elsewhere stated that it currently has about 1 million loops that would immediately qualify.[5] Yet, it does not provide the next-generation services that it says are capable of being provided over those loops. Rather, it (like the other Bells) has made these hybrid loop investments because deploying fiber further in the network makes economic sense independent of the ability to offer broadband services.

Thus, even with all of the fiber investment that BellSouth claims is necessary to provide "next-generation" services already in place, BellSouth does not find it worthwhile to deploy the electronics necessary to provide the services. Instead, BellSouth is, for example, entering into marketing ventures with DirectTV to provide video services.[6] This failure to deliver advanced services over fiber facilities cannot be the result of the Commission's unbundling rules; the

[4] *See*, *e.g.*, *TRO* ¶¶ 240, 274 & n.805; Corning Nov. 26, 2002 *Ex Parte*.

[5] BellSouth Corporation at Goldman Sachs Communicopia XII Conference, Oct. 1. 2003 (Investor Call with CEO Duane Ackerman) (transcript available at Fin. Disclosure Wire, 2003 WL 62797497) ("BellSouth Oct. 1 Investor Call Transcript") ("By the end of 2003, we will have passed almost a million homes with fiber"); K. Fitchard, *Bells' Letter Addresses Fiber's Future*, Telephony, June 2, 2003) (BellSouth "said it has 1 million homes passed by fiber to the curb, [but] isn't committing to any plans for filling that final 500 feet with optics").

[6] *See* "*BellSouth and DIRECTV Announce Agreement*" Aug. 27, 2003 (available at http://bellsouthcorp.policy.net/proactive/newsroom/release.vtml?id=43807).

"broadband" rules adopted in the *TRO* eliminate the ability of requesting carriers to obtain access to the full broadband capabilities of BellSouth's FTTC and other hybrid loops and entitle BellSouth to keep the full retail revenues from any next-generation, mass market services it chooses to provide over those loops. And under the penalty of the federal securities laws, BellSouth's chairman has acknowledged that the Commission's rules play no part in the company's current fiber deployment strategy. When recently asked whether there was "any scenario out of the FCC, which would cause you . . . to literally make a dramatic change in [BellSouth's] fiber deployment strategy," BellSouth's chairman responded that the "answer is still no. [Fiber deployment, especially retrofits are] a longer term proposition when you . . . look at the – all that's involved in doing that."[7]

Thus, BellSouth's Petition seeks to remove the incentive that the Commission relied upon to find that its rules could possibly encourage the Bells to move from incremental, operational network upgrades and regulatory gamesmanship to actual delivery of benefits to consumers in the form of next-generation services. While AT&T does not agree that reduced unbundling, in any form, would in fact provide such an incentive, even if that were true, it would plainly defeat the Commission's plan to encourage new deployment of true FTTH if BellSouth and other incumbents could gain those same regulatory benefits merely through FTTC deployment. The Commission's existing rules are based on the view that its regime will provide the Bells with at least some additional incentive to make the investment necessary to, in fact, bring advanced telecommunications capabilities to American consumers. In contrast, under the rules proposed by BellSouth, incumbent LECs that simply continue their longstanding programs to push fiber incrementally further into their networks either to reduce the costs of providing narrowband or extend the coverage of current DSL capabilities would be entitled to the same regulatory relief as

[7] *See* BellSouth Oct. 1 Investor Call Transcript, 2003 WL 62797497.

incumbent LECs that deployed FTTH – even if they do not make any of the additional investment necessary to realize the full next-generation service capabilities of that fiber.

At the same time, BellSouth's proposal would have profoundly adverse consequences for local competition. Given that the Commission's existing rules enable BellSouth to monopolize the next-generation capabilities of mass market hybrid loops, BellSouth's only purpose for seeking to amend the definition of FTTH loops must be to exploit those rules to limit competition in the provision of traditional services to those millions of consumers who happen to be served by loops with less than 500 feet of copper.[8] By radically decreasing the addressable CLEC market, BellSouth's proposal would also make it much more difficult for CLECs to reach sufficient minimum viable scale and thereby potentially eliminate UNE-P competition altogether.

**B. The "Reconsideration" That BellSouth Seeks Could Not Be Sustained.**

The FTTH rules reflect impairment evidence and findings that were specific to FTTH used to serve the mass market. Although very thin (and rebutted by other evidence), there was at least *some* material in the record that purported to show that CLECs were on an equal footing with ILECs with respect to at least "greenfield" FTTH deployments. For example, the Commission believed that CLECs had deployed a greater number of FTTH loops than the Bells.

[8] What is more, BellSouth's Petition is incredibly deficient in explaining the practical effects of how the unbundling rules would apply if FTTC loops were suddenly reclassified as FTTH. For example, with respect to the 1 million or so FTTC loops that BellSouth has already deployed, it is not at all clear whether it proposes that those loops would be treated as greenfield loops (with the result that all unbundling obligations might vanish) or brownfield loops (with the result that it would provide access to the existing copper). Likewise, if FTTC loops (whether existing today or deployed in the future to replace currently deployed copper) are deemed brownfield FTTH, it is not clear whether BellSouth proposes that the Bells would be relieved of their current obligations with regard to retirement of copper. Because the Commission's FTTH rules were intended to apply to "entirely" fiber loops, any reclassification of the rules to apply to hybrid loops presents these competitively significant issues, which BellSouth never attempts to address.

*Order* ¶ 275 & n.809.

The Commission also cited a FTTH-specific study sponsored by Corning that purported to demonstrate that FTTH was economical because it could be used to provide the same capabilities as digital cable (including video on demand and high definition TV) *and* broadband Internet access of speeds up to 20 Mbps. CSMG *Study* at 10, 18-24 (attached to Corning Nov. 26, 2002 *Ex Parte* Letter)). Similarly, the Commission cited comments of the High Tech Broadband Coalition, which touted the ability of FTTH to deliver the bandwidth that would enable new "cutting edge applications" such as "telemedicine" and "real-time video feeds of instructor lessons," "virtual reality," and "Internet appliances." HTBC Comments at 6-7, 15.

For FTTC, in contrast, there is absolutely no record evidence that CLECs have deployed FTTC at levels comparable to the Bells – or could economically do so – or that CLECs could earn revenues equivalent to those that would be generated by FTTH if they did deploy FTTC. Indeed, the Commission three separate times made clear that the evidence it was discussing regarding the ability to deploy FTTH did *not* apply to hybrid loops like fiber-to-the-node and FTTC loops. *See Order* nn.802, 811, 832. And that is why BellSouth now relies entirely on post-decision, extra-record evidence to support its position that FTTC can be deployed at costs comparable to FTTH and would generate comparable revenues.

BellSouth's reconsideration petition must be denied for that reason alone. The Commission's rules provide that petitions for reconsideration will not be granted, except in limited circumstances not applicable here, when they rely on evidence that could have been, but was not, previously presented to the Commission. 47 C.F.R. § 1.429(b). The *only* evidence BellSouth cites in its Petition is its own *ex parte* filed *after* the release of the *TRO*. Because the relief BellSouth seeks requires review of evidence that neither BellSouth nor any other party ever presented to the Commission prior to the *TRO* decision, BellSouth's proper course is not a

petition for reconsideration, but rather a petition for rulemaking.

But even if the Commission could consider these new claims and evidence in this context, they are patently insufficient to justify the relief it seeks. The entirety of BellSouth's "factual" showing is a Powerpoint presentation made by BellSouth's lawyers. *See* BellSouth Sept. 30, 2003 *Ex Parte*. None of the key assertions regarding the "equivalence" of FTTH and FTTC are supported by citation to appropriate engineering authorities, let alone attested by an expert affiant. Key factors are ignored altogether. For example, in purporting to show the fall off in data transmission rate as a function of the amount of copper in the loop, BellSouth does not even bother to provide a measure for the "x-axis" of its graph or explain how this chart was derived. *See id.*, Att. at 13. Even assuming it was not simply created out of whole cloth for advocacy purposes, BellSouth provides no evidence that the loops it actually has in its network (as opposed to perfect loops in a lab test) are capable of supporting the data transmission speeds that it claims in the graph. And BellSouth does not even attempt to show that FTTC can provide the same "cutting edge" services that can be provided over FTTH (such as video on demand and HDTV, which apparently requires 19.4 Mbps *per channel*). *See id.*, Att. at 10.

There certainly can be no finding on this record that FTTC has the *same* service capabilities as FTTH, as the very submission that BellSouth cites makes clear. *See id.*, Att. at 13. By definition, FTTH loops have higher bandwidth than hybrid loops and can support higher bandwidth services. BellSouth attempts to obfuscate this reality by implying that the *TRO* FTTH findings were based solely on the ability to provide voice, broadband Internet at currently available speeds and some (unspecified) level of video services, but that is false. In fact, both the *TRO* itself and the Corning and HTBC evidence upon which the Commission relied cited the ability to use FTTH to provide much higher speed broadband, HDTV, video on demand and "new," future services. *TRO* ¶ 276. Even if FTTC loops can provide some form of video

services – and BellSouth nowhere explains the nature of those services – they are clearly not the same as those that could be provided over higher bandwidth FTTH loops. Indeed, according to BellSouth's chart showing the bandwidth available for FTTC, BellSouth Sept. 30, 2003 *Ex Parte*, Att. at 13, providing merely 7 HDTV channels – which cable companies already provide to digital cable customers – would eat up almost the entire bandwidth that BellSouth says can be provided by FTTC, leaving nothing for any of the other services that would need to be offered.

There is likewise no basis for BellSouth's single paragraph claim that CLECs and ILECs are similarly situated with respect to FTTC costs in the ways that the Commission found with respect to FTTH costs. Petition at 6-7. With regard to FTTH, the Commission cited real-world (albeit limited) evidence that in true greenfield situations CLECs can deploy FTTH in competition with ILECs. *TRO* n.809 (noting that CLECs had deployed FTTH loops to 44,890 homes while ILECs had deployed FTTH to about 4,000 homes). The evidence is precisely to the contrary with respect to FTTC – although the Bells have millions of such loops (created primarily by adding fiber to existing loop connections), there is no evidence that CLECs have deployed any such loops. That is because the very impairment the Commission found with respect to copper loop deployment exists with respect to existing hybrid loops.[9] If the ILEC already has copper connecting a residence to its network, the fact that it need not build out the last 500 feet of copper and obtain the rights-of-way necessary to do so to "deploy" a FTTC loop gives it an insurmountable competitive advantage over the CLEC that must build all the way to the customer premise to deploy such a loop. *See TRO* ¶¶ 237-39.

Nor is there any basis for the lack of impairment finding that BellSouth claims should be made with respect to so-called "builds" that are mere extensions of existing loop facilities.

[9] *See TRO* ¶¶ 199, 286. In addition, there is overwhelming record evidence demonstrating that CLECs face impairment with respect to hybrid loops. *E.g.*, AT&T Reply at 146-65.

BellSouth acts as if its proposal would apply merely to true greenfields in which both ILEC or CLEC would have to build from scratch all the way from customer premises to switch, but, in fact, the expanded FTTH definition that BellSouth advocates would apply to both brownfield and greenfield situations. As described in the attached declaration of Anthony J. Giovannuci, in nearly all cases, the subloop plant extended to the "new build" will tie back into BellSouth's existing distribution network, or, in the case of larger developments, into existing feeder networks. Giovannuci Supp. Decl. ¶ 21. Incremental expansion of this kind permits BellSouth to lower costs through economies of scale not available to CLECs. *See id.* ¶¶ 4, 7-8, 12, 21.

BellSouth's existing ownership of rights of way also gives it significant advantages over CLECs. Even when it does have to deploy new facilities to extend service to a development, BellSouth will be able to do so using these existing rights of way. *See id.* ¶¶ 24-30. BellSouth's ability incrementally to expand its existing network to serve "new" developments is also materially furthered by its previous deployment of fiber. *See id.* ¶¶ 9-10, 22. Where dark fiber exists, adding "new" capacity requires only that optical terminating equipment be placed at each end of the facility (and where lit fiber exists, new capacity may only require upgraded electronics). *See id*. ¶ 22. Because the ILEC typically has *already* deployed excess fiber capacity, it can match any service the CLEC wishes to provide by performing comparatively inexpensive upgrades to the electronics associated with its existing facilities. In short, there is simply no possible basis for extending the TRO's FTTH "impairment" findings to FTTC or other hybrid loops.

## II. ILECS MUST MODIFY THEIR NETWORKS TO THE EXTENT NECESSARY TO PROVIDE CLECS WITH ACCESS TO HYBRID LOOPS.

For hybrid loops provided to the mass market, an incumbent LEC "shall provide" a CLEC with "nondiscriminatory access to the time division multiplexing ["TDM"] features, functions, and capabilities of [a] hybrid loop" to "establish a complete transmission path between

the [I]LEC's central office and an end user's customer premises." 47 C.F.R. § 51.319(a)(2)(ii).

Although its Petition is quite vague, BellSouth does not seem to recognize that this rule applies only to mass market loops, and not to enterprise loops, for it claims, for example, that any aspect of the "ILEC next-generation networks . . . should not be unbundled." *See* Petition at 16-17. But the Commission made clear and unambiguous distinctions between loops that serve the mass market and loops used to serve enterprise customers. *Compare TRO* ¶¶ 211-97 *with id.* ¶¶ 298-342. Further, the Commission made clear that even though DS1 level loops could be provided to both types of customers, *id.* ¶ 326, "the unbundling obligation associated with DS1 loops" to serve enterprise customers applies "regardless of the technology used to provide such loops" and is "in no way limited by the rules we adopt today with respect to hybrid loops typically used to serve mass market customers." *Id.* n.956. To the extent BellSouth's Petition attempts to weaken this clear distinction (and BellSouth provides no evidence to support eliminating it), its proposal would be severely anticompetitive and should be promptly rejected. CLECs may obtain access to DS1 and DS3 loops to serve enterprise customers "without restriction," *id.*, a finding that properly recognized that CLECs' impairment in serving enterprise customers was not reduced when ILECs deploy next-generation technology. The Commission should thus reject BellSouth's efforts to have the Commission change the *TRO* ruling that ILECs must provide unbundled access to DS1 and DS3 loops used to serve enterprise customers without restriction and regardless of technology.

BellSouth also asserts that the Commission's rule for mass market hybrid loops improperly requires it to provide access to "an 'unbuilt superior' network." Petition at 16-17. This claim is astonishing. BellSouth and other ILECs pleaded for the Commission to relieve them of requirements to unbundle the full capabilities of hybrid loops, even in instances where CLECs were unquestionably impaired without access to those loops. The Commission did

exactly that, declining to require the ILECs to provide access to the packetized capabilities of such loops. Now having been granted that relief, BellSouth seeks to deny CLECs the ability to use even the TDM functionalities necessary to provide a competitive alternative to the ILECs' traditional voice and DSL offerings. If BellSouth does not want to undertake any necessary modifications to allow CLECs to offer these services in exchange for broadband relief, then the rules that the Commission should reconsider are those granting the broadband relief.

The access ordered by the Commission is in no way "superior" access: to the contrary, it is decidedly *inferior* access, relegating CLECs to use of loops to provide only limited services and reserving for the ILECs' exclusive use packetized features of mass market loops. As courts have held, ILECs must modify their facilities "to the extent necessary to accommodate interconnection or access to network elements." *Iowa Utils. Bd.*, 120 F.3d at 813 n.33. That is all that the Commission has done here: CLECs are entitled to a loop with features specified in the Commission's rules, and, as the *TRO* finds, the ILECs must make "routine network modifications" in order to allow CLECs nondiscriminatory access to that UNE. *See TRO* ¶¶ 632-41; *see also U S West Comm. Inc.* v. *Minnesota Pub. Utils. Comm'n*, 55 F. Supp.2d 968, 983 (D. Minn. 1999) ("construction of a new facility does not necessarily mean superior interconnection. New facilities could be necessary just to create equivalent quality interconnection and access").[10]

## III. BELLSOUTH'S REQUEST FOR CLARIFICATION OF RULES RELATING TO MULTI-UNIT PREMISES IS NOT APPROPRIATE.

BellSouth also requests that the Commission "clarify" its rules with respect to multi-unit buildings. Petition at 9-10. These arguments are simply another version of BellSouth's attempt

[10] BellSouth's specific claim (Petition at 17) that "deploy[ing] a new multiplexer" with TDM functionality is improper has already been rejected by the Commission, which found that "attaching routine electronics, such as multiplexers . . . is already standard practice" and thus is precisely the type of routine network modification that ILECs undertake for themselves. *TRO* ¶ 635. BellSouth provides no basis for the Commission to revisit its conclusion.

to extend the regulatory relief that the Commission found appropriate only for nascent FTTH deployments to loop arrangements that are commonplace today. Here, the "curb" is the entry to a multi-unit building, and BellSouth again seeks to secure the regulatory benefits of true FTTH deployment without deploying any new fiber or delivering any next-generation services. Accepting this argument would, for the reasons canvassed in Part I, repudiate the purported public interest benefits and next-generation technology incentives that the Commission claimed could be achieved with its FTTH regulatory classification, allow the ILECs additional, significant opportunities to foreclose entry into local markets, and permit ILECs to subvert unbundling requirements related to enterprise facilities.

The first of BellSouth's proposed "clarifications" poses particular risks to the Commission's unbundling policies related to higher capacity loops to enterprise customers. BellSouth claims that a fiber loop constructed to *any* "multi-unit building premises" – whether a mass market or enterprise customer's premises (or some combination thereof) – should be deemed a FTTH loop. Petition at 9. BellSouth's proposed "clarification" would in fact significantly re-write the Commission's rules in a manner that would improperly foreclose competition. The Commission's rules relating to FTTH loops apply to loops used to serve mass market customers. *See Order* ¶¶ 273-84 (section on FTTH loops appears in subsection entitled "Specific Unbundling Requirements For *Mass Market* Loops"). Although the Commission's recent *Errata* struck the word "residential" from the definition of an FTTH loop, the amended rule could not rationally be read to mean, as BellSouth apparently believes, that *any* all-fiber loop to an end user's premises – even loops deployed to enterprise customers – is a FTTH loop. The rule, as defined, relates to fiber to the "home." Moreover, all-fiber loops that are deployed to enterprise customer locations are loops that must be unbundled according to the Commission's rules on dark fiber, DS-1, DS-3 and higher capacity loops. *See TRO* ¶¶ 298-342; *id* ¶ 325 n.956.

BellSouth confuses this fundamental distinction by re-naming the Commission's rules on FTTH loops as "fiber-to-the-premises" loops. Petition at 9. Based on its view that any fiber to any "premises" is governed by the Commission's rules on FTTH, BellSouth claims that the Commission should clarify that fiber deployed to community developments that include a "mix" of residential customers and stand-alone businesses need not be unbundled. *Id.* To the contrary, when BellSouth deploys an entirely fiber loop to an enterprise customer, then BellSouth must unbundle that loop, whether the customer is in a multi-unit building or a "mix" of stand-alone buildings that also include residential customers. *TRO* ¶ 347 (recognizing that barriers faced by CLECs in accessing customers in multi-unit premises extends "to all customers residing therein"). Were it otherwise, a CLEC could not obtain a loop to serve an enterprise customer that happened to be located on the retail floor of a large apartment building, but could obtain a loop to serve that same customer if it moved its operations to a building next door comprised entirely of enterprise customers – even though the impairment in both cases is the same.[11]

BellSouth's second "clarification" would entirely relieve ILECs of any purported regulatory incentive to deploy fiber to particular consumers' homes. BellSouth asks the Commission to "clarify" that a FTTH loop includes only the portion of the loop deployed to exterior of a multi-unit building, even if the ILEC controls copper inside wiring that comprises the balance of the loop, thus rendering the loop a hybrid loop. Petition at 10. But the Commission's rules are clear, and require that the "entire[]" loop consist of fiber in order for the reduced unbundling obligations to apply. 47 C.F.R. §51.319(a)(3). Accordingly, as BellSouth

[11] For example, the Lansburgh building in downtown Washington, DC, is comprised of apartment buildings on the top floor and holds a theater and other business operations on the ground floor. Under BellSouth's proposed "clarification," if the ILEC deployed fiber to the NID in order to serve the residential apartments, CLECs would no longer be able to obtain an unbundled loop for use in serving the business operations of the theater – even though CLECs could do so if the theater were housed in a stand-alone building or were part of building that hosted only other enterprise customers.

concedes (at 10), under "existing definition[s]," a loop in multi-unit dwelling where the BOC controls the copper wiring that is on the network side of the demarcation point (and thus is part of the loop, *see TRO* ¶ 343; 47 C.F.R. § 68.105) is a hybrid loop.

Moreover, where BellSouth controls the loop connecting the building entry to particular customers, it simply wishes to be rewarded for partial and incomplete deployment, even though, as with FTTC loops, it has made no showing that deploying fiber to an MDU's entry point and then connecting it with on-premises copper would in fact enable it to deliver the next-generation services that are the aim of the FTTH rules. Indeed, in large MDUs, there may be several hundred or a thousand feet of copper wire on the network side of the demarcation point, and the combination of this request with BellSouth's FTTC proposal would permit BellSouth to deploy what it would call "fiber-to-the-home" even though fiber could be more than a thousand feet from the end user's premises.

BellSouth points to the "disparity" that arises when another entity owns the loop within the building, but that issue is entirely unaffected by the Commission's determination that the Bells might be encouraged to deliver next-generation services if they face different unbundling obligations when install a new, entirely fiber loop. That separate issue is the longstanding one surrounding access to multi-unit premises: the "disparate regulatory treatment" about which BellSouth complains (at 10) is precisely the difficulty that CLECs face with respect to multi-unit buildings, and provides no basis to remove and distort the incentives that the FTTH policy was designed to create. Although the Commission's rules provide some mechanisms to allow CLECs the ability to obtain wiring controlled by ILECs, CLECs are often unable to obtain wiring that the owner of a multi-unit building controls and refuses to provide or provides only on discriminatory terms. Thus, CLECs, too, can be barred from serving multi-unit buildings based "solely on the entity owning or controlling the inside wire." *Cf.* Petition at 10. CLECs for years

have been urging the Commission to adopt building access rules that would help to reduce this disparity.[12] It would be patently unfair to provide relief only to the ILECs that would (supposedly) encourage them to provide broadband services to multi-unit buildings when the Commission has not yet acted to provide relief that would permit CLECs to provide any competitive services at all to such customers.

## IV. THE COMMISSION SHOULD REJECT BELLSOUTH'S "NEW" FACILITIES EXCEPTION TO DARK FIBER UNBUNDLING.

As BellSouth notes, the fiber-to-the-home rule, as originally written in the *TRO*, defined such loops as including fiber "dark or lit" to a "residential end user's customer premises." *See Order*, App. B at 13 (Rule 319(a)(3)). In the Erratum to the *TRO*, the Commission eliminated the word "residential" from the definition. BellSouth argues that the literal wording of both the fiber-to-the-home loop rule and the dark fiber rule (Rule 319(a)(6)) – if one remains oblivious to the detailed discussion in the *TRO* – could lead to the conclusion that both rules encompass dark fiber provided to businesses. BellSouth proposes to solve this "ambiguity" by limiting the availability of dark fiber loops to "enterprise dark fiber loops existing as of the effective date of the *Order*." Petition at 18.

There is no such ambiguity. The *TRO* makes clear that fiber-to-the-home loops are confined to loops used to serve mass market customers. *See TRO* ¶¶ 273-84 (section on FTTH appears in section entitled "Specific Unbundling Requirements For *Mass Market* Loops"). When it eliminated the word "residential" from Rule 319(a)(3), the Commission could not have intended to expand the scope of Rule 319(a)(3), as BellSouth suggests. Rather, the change was necessary to make clear, for example, that the fiber-to-the-home rule was not intended to exclude loops that serve a home office. The *TRO* clearly distinguished between elements that serve the

[12] *E.g.*, Comments of AT&T Corp., WT Docket No. 99-217 (filed on March 8, 2002; Jan. 22, 2001; Aug. 27, 1999).

mass market and enterprise customers, and the Commission obviously did not intend to (and could not lawfully) repeal this distinction in a mere erratum. In all events, BellSouth's proposed "solution" – to work a substantial change in the *TRO* by precluding access to all "new" dark fiber – has no grounding whatsoever in the terms of either rule and the *TRO* rejects in other contexts a distinction between "new" and old facilities for purposes of unbundling.[13]

## V. BOCs ARE REQUIRED TO PROVIDE BOTH NARROWBAND AND BROADBAND LOOPS, TRANSPORT AND SWITCHING FACILITIES "INDEPENDENT" OF § 251 UNBUNDLING OBLIGATIONS.

BellSouth asks the Commission to "clarify" that the *TRO* did not mandate that the BOCs provide unbundled access under § 271(c)(2)(B) to "broadband" loops, transport and switching. Petition at 10-12. Because the *TRO* is quite clear that access to broadband facilities must be provided under § 271(c)(2)(B), BellSouth argues in the alternative that the Commission should reconsider that holding. *Id.* at 12-15. Both requests should be denied.

The sole basis for BellSouth's claim that there is uncertainty as to the scope of the § 271 unbundling obligations is its assumption that the Commission's decision to eliminate certain broadband unbundling obligations under § 251(c) necessarily is in tension with any mandate that a BOC provide access to broadband facilities under § 271(c)(2)(B). *Id.* at 11. There is no such "conflict." The Commission expressly ruled that under § 271, BOCs must continue to "provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under section 251*." *TRO* ¶ 653 (emphasis added). The Commission also held that § 251(d)(2)'s "at a minimum" language required it to weigh the impact of unbundling on incentives to deploy broadband facilities. *Id.* ¶ 286. The § 271(c)(2)(B) checklist, however, does not permit any such balancing but unambiguously requires BOCs to provide unbundled access to all loops, transport

[13] For similar reasons, there is no need to establish a new definition of "end user's customer premise." Petition 19-20. The *Order* already establishes that the scope of the FTTH rule is confined to the mass market. Creating additional restrictions or definitions, as BellSouth suggests, would wall off additional customers that CLECs could not serve using UNE-P.

and switching facilities – obligations that the Commission is expressly prohibited from "limit[ing]" in any manner. § 271(d)(4).

Moreover, the BOCs represented that they would negotiate "wholesale services" to their fiber facilities. The Commission observed that these "negotiated" arrangements would be governed by §§ 201 and 202 of the Communications Act. *TRO* ¶ 253. Those same provisions would govern the rates, terms and conditions of network elements provided by the BOCs pursuant to § 271(c)(2)(B). *Id.* ¶ 656. Thus, requiring the BOCs to provide access to broadband facilities pursuant to § 271(c)(2)(B) subjects them to no greater regulatory scrutiny as to the terms and conditions of such access than the BOCs have already implicitly agreed is appropriate.

Nor did the Commission err in holding that the unbundling obligations under § 271 are independent of the obligations imposed by § 251. As the Commission recognized (*TRO* ¶ 654), the "plain language" of the § 271 checklist requires a BOC *both* to provide UNEs in accordance with 251(c)(3) (checklist item two) *and* to provide access to the specific facilities listed in checklist items four, five, six, and ten. *See* 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), (vi), & (x). Moreover, the terms and conditions of access differ under these two statutory provisions. *TRO* ¶ 655. Section 251(c)(3) provides potentially broader network access, because it applies to all incumbents, and it requires that UNEs be made available at any technically feasible point and at cost-based rates set according to § 252(d)(1). Section 271(c)(2)(B) applies only to the BOCs and requires only access to a specific core group of elements, and the Commission has found that "the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)." *UNE Remand Order* ¶ 470. Further, a BOC can effectively "opt-out" of providing § 271-mandated access if it chooses not to seek long distance authority in an in-region state; however, § 251(c)(3) is mandatory for all incumbent carriers.

BellSouth's alternative claim (at 13-14) that the Commission's interpretation of § 271

conflicts with *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) is frivolous. Even if BellSouth were correct (which it is not) that *USTA* "held that unbundling should not be ordered in the absence of a finding of impairment" because of the potential negative impact on investment incentives from unbundling, that holding is irrelevant to the scope of § 271 unbundling. As noted above, § 271 – unlike § 251(d)(2) – does not permit balancing and instead explicitly specifies the elements that must be unbundled by BOCs as a pre-condition to in-region long distance entry and expressly precludes the Commission from "limit[ing]" in any manner the obligations imposed by the checklist.[14]

## VI. THE PLAIN TEXT OF THE ACT MANDATES THAT THE BOCs "COMBINE" § 271 ELEMENTS.

BellSouth asks the Commission to "clarify" that it is not obligated to combine § 271 elements with § 251 elements (or other wholesale services). Petition 15-16. This is simply another attempt to argue that BellSouth may break apart elements that are already combined in its network, and presumably impose "glue charges" and other anticompetitive conditions on requesting carriers. BellSouth's argument is squarely foreclosed by the Act and has been rejected by both the Supreme Court and the Commission.

The Commission made clear in the *TRO* that the BOCs' provision of elements pursuant to § 271 is governed by §§ 201 and 202 of the Act. *TRO* ¶¶ 656, 663. Under the non-discrimination requirements of these provisions, a BOC is prohibited from separating § 271 elements that are already combined in the BOC's network or refusing to provide them in

[14] The § 271 orders cited by BellSouth (at 13) do not support its warped reading of § 271. Those orders did not even purport to address the issue, although they *did* analyze both whether the BOCs had satisfied their § 251(c)(3) obligation as well as their separate checklist unbundling obligation. *E.g. Qwest Nine-State 271 Order* (analyzing both compliance with checklist item ii *and* items iv-vi); *Arkansas-Missouri 271 Order* (same). A finding that a BOC had satisfied a § 271 unbundling obligation based on evidence that it also met an analogous § 251 obligation shows only that the substantive scope of the unbundling mandated by both sections is similar, not that the elimination of duties under the latter also repeals the obligations under the former.

combined form. The Supreme Court and the Commission have determined that § 251's nondiscrimination duty plainly forbids the ILECs from engaging in "anticompetitive practices" like breaking apart already combined network facilities, "not for any productive reason, but just to impose wasteful reconnection costs on new entrants," *Iowa Utils. Bd*, 525 U.S. at 395; *see Local Competition* ¶¶ 292-97. The §§ 201-202 nondiscrimination requirements similarly prohibit an incumbent from separating § 271 elements that are already or ordinarily combined.

The conclusion applies even more strongly to combining § 271 elements with § 251 elements, for at least two additional reasons. First, any refusal to offer a § 251 element in combination with a § 271 element would violate not only §§ 201-02 but also the separate nondiscrimination requirement of § 251(c)(3); incumbents obviously do not impose the costs of separating elements on themselves. *See TRO* ¶ 581 (restrictions on combining UNEs with wholesale services would violate the nondiscrimination requirement of § 251(c)(3)). Second, § 251(c)(3) also requires incumbents to provide access to unbundled network elements at any technically feasible point, and the Commission expressly confirmed in the *TRO* (¶ 581) that "[a]n incumbent LEC's wholesale services constitute one technically feasible method to provide nondiscriminatory access to UNEs and UNE combinations." There can no dispute that combining § 271 elements with § 251 elements is technically feasible, and therefore the Commission's holding applies to § 271 elements no less than it does to other wholesale services. *See also id.* (separately holding that refusing to combine UNEs with wholesale services would constitute both an "unjust and unreasonable practice" under § 201 and an "undue and unreasonable prejudice or advantage" under § 202).[15]

[15] Although the Commission declined to adopt a rule "pursuant to section 271" that would require incumbents to combine § 271 elements (*see Order* ¶ 656 n.1990), such a rule would be unnecessary because §§ 201-02 require incumbents to offer § 271 elements in combination.

## CONCLUSION

The Commission should deny the Petition.

Respectfully submitted,

/s/ Leonard J. Cali

Leonard J. Cali
Lawrence J. Lafaro
Stephen C. Garavito
AT&T CORP.
One AT&T Way
Bedminster, NJ 07921
(908) 532-1850

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD, LLP
Bank One Plaza
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7237

David L. Lawson
C. Frederick Beckner III
Michael J. Hunseder
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Corp.

November 6, 2003

## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2003, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: November 6, 2003
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

**SERVICE LIST**

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554[16]

Qualex International
Portals II
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554

Jonathan B. Banks
Lisa S. Foshee
BellSouth Corporation
Suite 900
1133 21st Street, NW
Washington, D.C. 20036

Jeffrey S. Linder
Joshua S. Turner
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, D.C. 20006

[16] Filed electronically via ECFS

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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|---|---|---|
| **In the Matter of** | ) | |
| **Review of the Section 251** | ) | **CC Docket No. 01-338,** |
| **Unbundling Obligations of** | ) | **No. 96-98 &** |
| **Incumbent Local Exchange Carriers** | ) | **No. 98-147** |
| | ) | |

**SUPPLEMENTAL DECLARATION OF**
**ANTHONY J. GIOVANNUCCI**
**ON BEHALF OF AT&T CORP.**

1. My name is Anthony J. Giovannucci. My business address is 429 Ridge Road, Dayton, New Jersey. I am a Division Manager with AT&T's Network Engineering and Operations ("NEO") organization, the organization within AT&T Corp. that, among other things, provides local service to AT&T Business customers. In my current position I am responsible for a number of key areas of Outside Plant activity, including the development of an Outside Plant ("OSP") plan of record for capital deployment; negotiation and completion of agreements controlling rights of way ("ROW"), franchises and joint facilities builds. Additionally, I am responsible for the development and application of Standard Network Architecture Guidelines. Prior to my present position, I did contract work at various regional Bell companies (BellSouth) and operations companies between 1987 and 1993; from 1993 to 1998, I worked at TCG, which was acquired by AT&T in 1998.

2. As a Division Manager in NEO, I am part of a larger team that is responsible for the efficient planning, engineering, delivery and management of local network

capacity, assets, and associated information services. In general, this team ensures that NEO optimizes the use of its limited resources and controls expenses while meeting end-user customers' expectations and allowing for an appropriate return on the company's investment.

3. The purpose of this Declaration is to respond to the argument of BellSouth that architectures that are purported "service equivalents" to fiber-to-the-home ("FTTH"), such as fiber-to-the curb ("FTTC"), should not be subject to unbundling requirements.[1] As part of its argument, BellSouth argues that: (1) the "only" difference between FTTH and FTTC is that FTTC uses a copper subloop and coaxial cable, rather than fiber, for the "last step" of connecting the fiber from the central office to the demarcation point at the customer's premises; and (2) "the presence of copper in these loops does not . . . give the ILECs a competitive advantage."[2]

4. BellSouth's assertion that ILECs have no advantage over CLECs in the provisioning of FTTC is flatly wrong. First, for ILECs such as BellSouth, the deployment of FTTC loops requires only an incremental extension of their existing networks – or no work at all, given the ILECs' ubiquitous deployment of copper subloops on those networks. By contrast, CLECs will be required to construct both the copper subloops *and* the necessary fiber network from scratch. Second, ILECs can perform any necessary construction using the rights-of-way that they currently own, while CLECs must delay construction of their facilities until they obtain the necessary rights-of-way from governmental authorities. These factors enable the ILECs to install FTTC loops in far less time, and at substantially lower cost, than the CLECs.

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[1] *See* Petition for Clarification and/or Partial Reconsideration of BellSouth ("Petition"), filed October 2, 2003, at 1-9.

[2] *See id.* at 3, 6-7.

## I. THE ILECs' NETWORK ARCHITECTURE GIVE THEM AN ENORMOUS ADVANTAGE OVER CLECs THAT ATTEMPT TO DEPLOY THEIR OWN NETWORKS.

5. To understand the advantages that the ILECs' position as historical monopolists gives them in the context of FTTC technology, it is useful to begin by explaining briefly how the ILECs deployed their ubiquitous networks, and how CLECs such as AT&T deploy their own networks as new entrants.

6. The ILECs deployed their local telephone networks as legally protected monopolists, and as such they were guaranteed the ability to serve all demand for telecommunications services for everyone, everywhere. The ILECs were also regulated under a regime that provided an authorized rate of return on all investment. Under these conditions, the ILECs were able to construct networks that not only addressed all current demand at low per-unit cost, but also potential demand far into the future.

7. Most of the cost of deploying transmission facilities is not in the conductor itself (whether copper or fiber), but in the supporting infrastructure – the trenching, poles, conduits, rights of way, and building access. As protected monopolists, the ILECs were guaranteed the ability to serve all demand, and therefore were able to construct an efficient and ubiquitous network consisting of high-capacity transport and loop feeder plant reaching every neighborhood and locale in an area. Because the ILECs were assured of serving all demand, they could spread the high fixed costs of deployment over virtually all customers, both large and small, and achieve very low per-unit costs.

8. In particular, the ILECs built their loop and transport plant to maximize these efficiencies. For example, in their loop plant, the ILECs built high-capacity feeder plant to

connect their central offices with every neighborhood, and then built progressively low capacity lines to connect these intermediate points to each customer premise. As a result, whether the conductor used is copper or fiber, the ILECs already have feeder and distribution plant built to virtually every location in an exchange area, and can serve new customers or add new services merely by making incremental changes in existing loop plant. Indeed, even in a new build area (which is sometimes misleadingly called a "greenfield" build), with rare exceptions the ILEC can serve such locations merely by making incremental modifications to its existing plant. The same is true of transport. The ILECs already have ubiquitous fiber transport networks in place that connect all of their central offices, and in almost all circumstances they can add capacity to these networks merely by making relatively inexpensive upgrades to the attached electronics.

9. Moreover, as the ILECs deployed their local networks, they designed their infrastructure to accommodate not only existing demand, but demand well into the future. Because the fixed costs of deploying all transmission facilities, including fiber (trenching, support structure, and laying cables) are extremely high, BellSouth and the other ILECs often have deployed extra capacity (both fiber and copper plant) in their networks that they know will eventually be used because of their substantial customer base. Further, as the sole providers of service, ILECs can justify the extension of facilities into areas of anticipated demand, often years before that demand actually materializes.

10. The deployment of excess fiber capacity in their networks results in substantial cost savings for the ILECs, because it is far less expensive to deploy such excess capacity during initial construction than to add it later. An ILEC can use its excess capacity to match any service that a CLEC wishes to provide by performing comparatively inexpensive upgrades to the electronics associated with existing facilities. Where dark fiber exists, adding

"new" capacity requires only that optical terminating equipment be placed at each end of the facility. And even if no dark fiber exists, it is generally feasible to upgrade the existing terminal electronics to significantly increase the ILECs' capacity (for example, from an OC-3 to an OC-12 or OC-48).

11. As the sole providers of a utility service, ILECs also were granted comprehensive rights of ways by local governments, often accompanied by the power of eminent domain, without the requirement to compensate the governmental entity. This enabled them to expand their networks as demand conditions warranted, without the need to obtain additional governmental approval.

12. The ILECs' ability to deploy their networks under these conditions has provided them with a enormous advantage over time. For virtually any customer a CLEC might want to serve, the ILECs have *already* deployed transmission facilities to reach that location, and critically, they are *already* recovering the high fixed cost of those facilities spread over a base of a large number of customers. As demand increases, and the need for service over larger areas arises, the ILECs are thus able to add new services, capacity, or new customers by using existing facilities with relatively inexpensive, incremental additions (*i.e.*, in many cases simply by adding electronics to dark fiber or upgrading electronics on previously lit fiber).

13. In sharp contrast, a CLEC cannot rely on either guaranteed demand or a guaranteed return, and must build a competitive local network "from scratch." Therefore, an entirely different set of factors must underlie a CLEC's decision to build such a network "from scratch." The most important is the specific demand for the CLEC's local services from specific customers in specific locations. Also crucial is the existence of favorable conditions for facility

construction, including the ability to obtain rights-of-way and building access and the potential to partner with other carriers to share initial expenses. The CLEC must also consider the availability and price of wholesale facilities from the ILEC, because a CLEC generally cannot reach any end-user customer without access to at least some ILEC facilities.

14. CLECs such as AT&T would prefer to provide service to their customers entirely on their own networks, free from dependence on the facilities of the ILECs. However, the difficulty of cost justifying the construction of such a network, along with a number of significant practical impairments, not only makes ubiquitous deployment impossible, but also severely limits the ability of AT&T or other CLECs to deploy a network that is sufficiently comprehensive to serve all but a small number of customers totally "on net."

15. This contrasts starkly with the conditions under which the ILECs built their networks. CLECs' network growth is tied directly to the number of customers served and the amount of traffic they generate, (and thus their ability to cost justify the initial build – assuming that capital is available for the project. ILECs, however, were able to build their network with the assurance of serving 100 percent of the demand in any one area and with no concern for the availability of capital because of their assured rates of return. This fundamental difference requires a CLEC to develop its network from the core (*i.e.*, backbone and switch) outward to its nodes, and then ultimately, to the customers. ILECs, on the other hand, did not have to focus on obtaining the economies of scale needed to build loop plant. Instead, the ILECs merely had to design and build efficient loop plant reaching all end users, and then design the rest of its network to interface with its loops.

## II. EXEMPTING FTTC LOOPS FROM THE ILECs' UNBUNDLING REQUIREMENTS WOULD PUT CLECs AT A SUBSTANTIAL COMPETITIVE DISADVANTAGE.

16. As described in AT&T's Opposition to BellSouth's Petition, BellSouth's proposal to treat FTTC loops as FTTH loops would likely free the ILECs of *any* unbundling obligations with respect to millions of hybrid-fiber-copper loops, including FTTC loops. As a result, CLECs could no longer serve these millions of mass market customers through UNE platform arrangements.

17. Given the above-described disparities between the networks of the ILECs and the CLECs, the ILECs would have a substantial competitive advantage over CLECs if the Commission approved BellSouth's proposal. First, because the ILECs (unlike the CLECs) have generally deployed the copper subloops that would be used in FTTC situations, the ILECs would be required (at most) to build only a simple extension of their existing networks – in contrast to the CLECs, which would be required to construct those copper subloops (as well as the fiber) from scratch. Second, even in those relatively rare situations when an ILEC must deploy entirely new facilities to extend service to a development, the ILECs can do so more expeditiously, because they can proceed to construct the necessary facilities by using their existing rights-of-way, which CLECs do not have and must obtain from governmental authorities before they could begin construction of their own facilities.

### A. For ILECs, Unlike CLECs, the Construction of a FTTC Loops Under FTTC Would Typically Require a Relatively Simple Extension of Their Existing, *Ubiquitous* Networks.

18. In FTTC systems, the ILECs take the existing fiber feeder portion of the loop and extend the fiber from it closer to customers' homes (usually within 200 to 500 feet) by

using their existing trenches, structures, and conduit. They can aggregate the installed base of traffic from the customers in the area on the fiber. Once FTTC has been installed, the ILECs only need to install 200 to 500 feet of a copper subloop to connect the FTTC system to a particular customer's premises. *See* Petition at 2.

19. Because of the existence of their existing network, associated economies of scale, and access to rights of way, the deployment of FTTC, including the "last step" of constructing a copper subloop to the demarcation point at the customer's premises (Petition at 7), is far simpler for ILECs than for CLECs, which must construct everything from scratch in order to deploy the same facilities.

20. In particular, in "brownfield" deployments, where the ILEC is laying fiber that lies parallel to or replaces existing copper plant, the ILEC has *already* ubiquitously deployed the "copper subloop" that would be used in FTTC situations. CLECs, by contrast, have nowhere deployed these "copper subloops." Obviously, it is far less expensive to construct an FTTC system using copper loops previously laid than by starting "with nothing." ILECs therefore plainly have a significant competitive advantage in these circumstances.

21. Even in those situations where a new subdivision or new homes are being built and copper distribution is newly laid, the deployment of FTTC loops would be a relatively simple task for the ILECs. This is not a true "greenfield" deployment, where an entire plant must be built from scratch for a massive new development large enough to support its own switch and built on previously vacant land.[3] Instead, the ILEC's ubiquitous local network

[3] Even in true "greenfield" deployments, the ILEC would have a substantial advantage over the CLEC, because the ILEC's ownership of existing rights-of-way would enable it to construct the necessary facilities more expeditiously. *See* Part II-B, *infra.*

enables it to make only incremental extensions in order to serve most of the "new" builds. In nearly all cases, the subloop plant extended to the "new" builds will tie back into the ILEC's existing distribution network or, in the case of larger developments, into existing feeder networks. Calls then will be carried over common facilities that transport the existing, enormous demand of the ILECs, including BellSouth. The high volume of this traffic enables BellSouth and other ILECs to reduce their average costs of service, thus achieving economies of scale.

22. In many instances, the ILEC's ability to incrementally expand its existing network to serve "new" developments is materially furthered by its previous deployment of dark fiber. As previously stated, the existence of dark fiber enables the ILEC to add "new" capacity simply placing optical terminating equipment at each end of the facility.

23. A CLEC, by contrast, faces a vastly more complex and expensive task to extend service to a development. Because it does not have and cannot rely on the ILEC's existing facilities, a CLEC would always be required to build the cooper subloops as well as the fiber connecting the central office to the subloop "from scratch" (either using feeder/distribution plant or local fiber rings), without the advantage of an existing ubiquitous network that would make the new build merely incremental. This difference again puts the ILEC at an enormous cost advantage.

### B. The ILECs' Existing Ownership of Rights-of-Way Gives Them an Additional Significant Competitive Advantage Over CLECs.

24. In addition to advantages ILECs gain from existing facilities that they previously have deployed near a new development, BellSouth and other ILECs have another distinct competitive advantage due to their existing ownership of rights-of-way, which they obtained long ago. This advantage exists not only in the "brownfield" and "new build" scenarios

described above, but anytime the ILECs are required to deploy new facilities, including "true" greenfield circumstances where the serving carrier will deploy a new switch along with loops. On the other hand, because a CLEC cannot begin construction of its facilities until it successfully negotiates a right-of-way agreement with the local municipality where the CLEC seeks to provide service, the CLEC cannot construct its facilities as expeditiously as the ILECs, who already have the rights-of-way that they need to perform the construction.

25. When negotiating with CLECs, municipalities often demand exorbitant fees and other onerous conditions. Although a typical franchise agreement may take between four and six months to negotiate, AT&T has franchise negotiations (and accompanying litigation) that remain unresolved after several years. Furthermore, even after a franchise agreement has been negotiated, a municipality's ratification process can add as much as 60-90 days before construction can begin. These types of problems are not isolated incidents; AT&T has experienced such delays and additional costs across the country.

26. While Section 253(c) of the Act allows municipalities to be compensated for the costs they incur as a result of managing the use of public rights-of-way by telecommunications providers, both the federal law, and in many cases state law, prohibit municipalities and other governmental entities from actually profiting from rights-of-way fees. In spite of this clear prohibition, AT&T often encounters instances of blatant over-reaching by municipalities in establishing franchise-type fees.[4]

[4] AT&T has previously described examples of such over-reaching in this proceeding. *See* Declaration of Anthony Fea and Anthony Giovannucci on Behalf of AT&T, filed July 17, 2002, ¶¶ 32-33 ("Fea/Giovannucci Decl."). The terms "franchise" and "right of way" are often used interchangeably to describe the permission needed to actually construct telephone facilities. However, the permission a LEC seeks from the municipality is the ability to access rights of way

27. The imposition of other extraneous and burdensome regulations are also often included in connection with government entities' granting of a franchise. Despite decisions of this Commission and the courts delineating precisely what falls within the rubric of rights-of-way management and what does not, many local authorities continue to require compliance with regulations that are unrelated to the management of rights-of-way, but instead seek to control other carrier operations.

28. Perhaps the greatest burden on CLECs are unreasonable delays in the granting of access to rights-of-way. AT&T has previously described in this proceeding a number of examples of such delays that it has experienced.[5] Because of the delays incurred in negotiating ROWs, CLECs are not able to begin construction of FTCC loops as quickly as the ILECs, which already have the necessary ROWs. This puts CLECs at a serious competitive disadvantage, because the ability to provide service to a customer promptly after a customer has requested it is critical to a CLEC's ability to attract a sufficient customer base. Business customers, for example, typically seek service in time frames measured in days or weeks, because they need the new services or added capacity in order to address immediate business needs. Many of these customers are not willing to agree to take service from a CLEC and then wait for months before the necessary ROWs are obtained and construction is completed. Thus, although a customer might prefer to use a CLEC as its service provider, its need for immediate service will trump that preference if the ILEC can provide the service at an earlier time.

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within the municipality to build. The "franchise," or actual right to provide telecommunications service, is granted by the state commission.

[5] *See* Fea/Giovannucci Decl. ¶¶ 35-37.

29. To avoid the delays caused by negotiations for rights-of-way, CLECs have three choices: they can accept these burdensome and discriminatory conditions; use the existing facilities of the ILEC, with which the CLEC is in competition; or forego competing to provide service to customers. None of these alternatives put a CLEC in a practical position to compete.[6]

30. Even when negotiations for rights-of-way are successfully completed, the construction process is further delayed by the CLECs' need to negotiate additional agreements with other parties, including the ILEC, and to comply with the requirements of the laws of certain municipalities. For example, a CLEC may need to negotiate agreements with other parties to address the use of existing rights-of-way capacity or the development of new right-of-way capacity on the CLEC's desired route. In addition, many municipalities have specific provisions requiring carriers to build facilities jointly (*e.g.*, coordination of street digging), and some municipalities have placed restrictions or moratoria on new construction. All of these requirements add complexity, cost, delay and uncertainty to any attempt to obtain a permit and initiate construction.[7]

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[6]The final option open to AT&T or another CLEC is to simply anticipate the delays and build facilities well in advance of customer needs, much the same way the ILECs originally built their networks. Unfortunately, the realities of the market, including the CLECs' current inability to obtain capital, demonstrate that this "build it and they will come" option is simply the road to insolvency.

[7] It is important to note that even in circumstances in which these provisions are presently applied equally to all carriers, the ILEC is likely to have obtained its franchise and accompanying benefits prior to the imposition of the current requirements. This often leads to situations where municipalities seek significant payments or benefits from the CLECs that were not originally imposed on the ILEC (*e.g.*, to have part of the CLEC's network assigned to the municipality). Further, it is not uncommon for municipal ordinances to allow existing providers, *i.e.*, the ILEC, to be "grandfathered."

## CONCLUSION

31. BellSouth's assertion that ILECs enjoy no advantage in the deployment of fiber-to-the-curb is simply contrary to reality. In "brownfield" situations, ILECs have already deployed the copper subloop that is used in FTCC situations. Even in those circumstances where new homes are being built and copper distribution is newly laid, BellSouth and the other ILECs are required only to make only an incremental expansion of their networks. By contrast, the CLECs, who do not have networks of such scope and demand, will be required to build the copper subloops (and the fiber) from scratch. Furthermore, in attempting to provide service comparable to that of the ILECs, CLECs would encounter substantial delays and costs in obtaining the necessary rights-of-way to build the necessary facilities – a problem that ILECs do not experience due to their current ownership of ROWs.

**VERIFICATION PAGE**

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Anthony J. Giovannucci

Dated: 11/06/03